Sabai ak Nabau (the administrator of the estate of Jabu ak Sabai (deceased)) v Lau Yew Hak & Anor

HIGH COURT (BINTULU) — CIVIL APPEAL NO BTU-12B-1/5 OF 2012
JOHN KO WAI SENG JC
4 JULY 2012

Civil Procedure — Appeal — Notice of — Whether notice of appeal against decision of sessions court served out of time — Whether time to file and serve notice of appeal started to run from the day following day of decision — Subordinate Courts Rules 1980 O 49, O 49 r 2(3), (6), O 3 r 2(1) & (2)

Following the sessions court's dismissal of his claim against the respondents on 20 April 2012, the appellant filed the instant appeal to the High Court against the decision five days later. The notice of appeal was served on the respondents' solicitors on the morning of 4 May 2012. The respondents' solicitors raised a preliminary objection at the appeal hearing that the notice of appeal was served on them outside the 14 day time frame specified under O 49 r 2(6) of the Subordinate Courts Rules 1980 ('SCR') and that the appeal should be dismissed on that ground.

Held, dismissing the preliminary objection with costs:

(1) There had been no failure to comply with O 49 r 2(6) of the SCR. The notice of appeal was served on the last day of the time limited for service upon the defendants/respondents (see para 20).

(2) Since the sessions court's decision was made on 20 April 2012, based on O 3 r 2(2) of the SCR time to appeal would only start to run from the next day. The 14 days starting with 21 April 2012 would make 4 May 2012 the last day for filing and serving the notice of appeal to comply with O 49 r 2(3) and (6) of the SCR (see para 19).

(3) Failure to comply with O 49 r 2(6) of the SCR by not serving the notice of appeal within the 14 days stipulated would render an appeal a nullity (see para 16).

[Bahasa Malaysia summary

Berikutan penolakan tuntutannya oleh mahkamah sesyen terhadap responden-responden pada 20 April 2012, perayu memfailkan rayuan ini ke Mahkamah Tinggi terhadap keputusan tersebut lima hari kemudiannya. Notis rayuan diserahkan ke atas peguam responden-responden pada pagi 4 Mei 2012. Peguam responden-responden membangkitkan bantahan awal pada

pendengaran rayuan bahawa notis rayuan diserahkan kepada mereka di luar jangka masa 14 hari yang dinyatakan di bawah A 49 k 2(6) Kaedah-Kaedah Mahkamah Rendah 1980 ('KMR') dan bahawa rayuan tersebut patut ditolak atas alasan tersebut.

Diputuskan, menolak bantahan awal dengan kos:

(1) Tidak terdapat kegagalan mematuhi A 49 k 2(6) KMR. Notis rayuan diserahkan pada hari akhir masa yang dihadkan untuk penyerahan ke atas defendan-defendan/responden-responden (lihat perenggan 20).

(2) Memandangkan keputusan mahkamah sesyen dibuat pada 20 April 2012, berdasarkan A 3 k 2(2) KMR masa untuk merayu hanya akan mula berjalan dari hari berikutnya. 14 days tersebut bermula dengan 21 April 2012 akan membuatkan 4 Mei 2012 hari akhir untuk memfailkan dan menyerahkan notis rayuan untuk mematuhi A 49 k 2(3) dan (6) KMR (lihat perenggan 19).

(3) Kegagalan mematuhi A 49 k 2(6) KMR dengan tidak menyerahkan notis rayuan dalam masa 14 hari yang ditetapkan akan menyebabkan rayuan tersebut terbatal (lihat perenggan 16).]

Notes

For cases on notice of appeal, see 2(1) *Mallal's Digest* (4th Ed, 2012 Reissue) paras 1465–1570.

Cases referred to

Bukit Punchor Development Sdn Bhd v Yomart Environmental System (M) Sdn Bhd [2002] 5 MLJ 301, HC (refd)

Lee Lan v Lim Yoon Loy & Ors [1991] 3 MLJ 419, SC (refd)

Soh Keng Hian v American International Assurance Co Ltd [1996] 1 MLJ 191, CA (refd)

Tan Thye Heng v Pan Mercantile (S) Pte Ltd & Anor [1990] 1 MLJ 208, HC (refd)

Legislation referred to

Subordinate Courts Rules 1980 O 3 r 2(1), (2), O 49, O 49 r 2(3), (6)

Sarbjit Singh Khaira (Joseph Kahell Baleng with him) (Khaira & Co Advocates) for the appellant.

William Ding (William Ding & Co Advocates) for the respondent.

Patrick Liaw (Jimmy HT Wee & Co) for the third party.

John Ko Wai Seng JC:

RULING

INTRODUCTION

[1] The defendants/respondents are making a preliminary objection to the

plaintiff/ appellant's appeal on the ground that the notice of appeal to the High Court which was served to the 4 May 2012 to the defendants' solicitors was out of time.

FACTS OF THE CASE

[2] The subject matter of the suit in the sessions court is a civil claim arising out of a fatal road traffic accident on 4 March 2006 involving a tripartite vehicles collision along Jalan Tun Ahmad Zaidi, Bintulu, Sarawak.

[3] The plaintiff as administrator of the deceased is suing the other parties involved in the accident, the two defendants/respondents in which the first, second and third parties have been joined in.

[4] After a full trial, the learned sessions judge on the 20 April 2012 delivered his decision to dismiss the plaintiff's action with costs.

[5] On the 25 April 2012, the plaintiff filed a notice of appeal to the High Court appealing against the decision of the sessions court.

[6] The plaintiff's solicitors served their notice of appeal to the defendants' solicitors on the 4 May 2012 at 11.25am.

ISSUE

[7] Learned counsel for the defendants/respondents submitted in reference to the law on service of notice of appeal that on the failure of the plaintiff/appellant to serve on time case the appeal ought to be dismissed with costs for non-compliance. Further there is no formal or informal application made by the plaintiff/ appellant for the extension of time to serve the notice of appeal out of time nor any reason forwarded to the court by the plaintiffs/ appellant's counsel for their failure to serve the notice of appeal within the 14 days requirement.

[8] Learned counsel for the plaintiff/appellant submitted that the service of the notice of appeal on 4 May 2012 was within the 14 day time frame stipulated by O 49 r 2(6) of the SCR 1980.

[9] The court will now consider the relevant rules of the Subordinate Court Rules 1980 governing the issues raised by the parties as follows:

Appeal: Order 49 of the SCR 1980

[10] The relevant rules of the SCR 1980 governing service of notice of appeal are as follows:

[11] Order 49 r 2(3) of the SCR 1980:

> The notice of appeal shall be filed *within 14 days from the day on which such decision was pronounced* … (Emphasis added.)

[12] Order 49 r 2(6) of the SCR 1980:

> The Notice of Appeal shall be served by *the Appellant within the time limited for the filing of the appeal on all parties directly affected by the Appeal* or their respective solicitors. It shall not be necessary to serve the parties not so affected. (Emphasis added.)

[13] The appeal timing is settled in *Lee Lan v Lim Yoon Loy & Ors* [1991] 3 MLJ 419 by Harun Hashim SCJ when he held (p 421D):

> The rule at present in force was amended in 1991 to read:

r 2 (6)	The Notice of Appeal shall be served by the Appellant *within the time limited for the filing of Appeal* on all parties directly affected by the appeal or their respective solicitors. It shall not be necessary to serve parties not so affected. (Emphasis added.)

> The 1991 amendment has now put the position beyond dispute. The correct procedure then is this:
>
> (a) First, file the Notice of Appeal in the Court appealed *from within 14 days from the date of decision*;
>
> (b) *Next, serve a copy of the Notice of Appeal showing the date on which it was filed in Court, on the Respondent or his solicitors, also within 14 days from the date of decision*.
>
> (Emphasis added.)

[14] On the competency of an appeal according to *Soh Keng Hian v American International Assurance Co Ltd* [1996] 1 MLJ 191 where it was held (p 191H):

> (1) An appeal is brought to this court by filing and serving the notice of appeal. The one act without the other renders the appeal incompetent.

[15] With the consequential effect according to *Tan Thye Heng v Pan Mercantile (S) Pte Ltd & Anor* [1990] 1 MLJ 208 that because (p 208 I):

> The meaning of appealing, is 'giving notice to your adversary of your intention to appeal, by serving upon him a notice of appeal'. Since the notice of appeal was not served within time, there was accordingly no appeal in existence to the High Court.

[16] The court agrees with the submission of learned counsel for the defendants/respondents that if there is a failure to comply with O 49 r 6(2) of the SCR 1980 by serving the notice of appeal within the 14 days stipulated will render the appeal a nullity.

Calculation of time

[17] The court will now consider whether the notice of appeal was served out of time by plaintiff/appellant to the defendants/respondents.

[18] Order 3 r 2(1)–(2) of the SCR 1980 governs the calculation of timing:

> (1) Any period of time fixed by these rules or by any judgment, order or direction for doing any act shall be reckoned in accordance with the following provisions of this rule.
>
> (2) Where the act is required to be done within a specified period after or from a specified date, *the period begins immediately after that date*. (Emphasis added.)

See *Bukit Punchor Development Sdn Bhd v Yomart Environmental System (M) Sdn Bhd* [2002] 5 MLJ 301.

[19] The sessions court decision was made on 20 April 2012, based on O 3 r 2(2) of the SCR 1980 time to appeal will only start running from the next day which is the 21 April 2012. The 14 days starting with 21 April 2012 will make 4 May 2012 the last day for filing and serving the notice of appeal to comply with O 49 r 2(3) and (6) of the SCR 1980.

[20] The court agrees with the submission of learned counsel for the plaintiff/appellant that there has been no failure to comply with O 49 r 6(2) of the SCR 1980 by the service of the notice of appeal on the last day of the time for service upon the defendants/respondents.

CONCLUSION

[21] The court will dismiss the preliminary objection of the defendants/respondents with costs to the plaintiff/appellant in any event.

Preliminary objection dismissed with costs.

Reported by Ashok Kumar